

Salem Village I, Inc., Salem Village II, Inc., and Salem Village III, Inc. and Professional and Health Care Employees Division, Local 1453, Retail Clerks Union, Chartered by United Food and Commercial Workers International Union, AFL-CIO-CLC. Case 13-CA-20575

August 25, 1982

ORDER

**BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN**

On July 1, 1981, the Board issued a Decision and Order¹ in the above-entitled proceeding in which the Board, *inter alia*, granted counsel for the General Counsel's Motion for Summary Judgment and found that Respondent violated Section 8(a)(5) of the National Labor Relations Act, as amended, by refusing to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all employees of Respondent in the appropriate unit. On April 9, 1982, the United States Court of Appeals for the Seventh Circuit denied the Board's application for enforcement of the Board's Decision and Order and remanded this matter to the Board to conduct an evidentiary hearing in connection with various Respondent's objections to conduct affecting the second election.² On June 21, 1982, the Board advised the parties that it had decided to accept the remand from the court of appeals and advised all parties that the Board would take appropriate action consistent with the court's remand. On July 19, 1982, the Board issued an Order Remanding Proceeding to the Regional Director for Hearing. In its Order, the Board directed that a hearing be held before an administrative law judge on the issues remanded by the court. The Board's Order also provided that upon conclusion of the hearing the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations and that following service of such supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable.³ On August 4, 1982, Respondent sent a letter to the Board contending that the Board's action in this matter is "wholly inappropriate, illegal, and in contempt of the United States Court of Appeals for the Seventh Circuit."

¹ 256 NLRB 1015.

² The Board's Supplemental Decision and Certification of Representative in Case 13-RC-15219 is not reported in volumes of Board Decisions.

³ Sec. 102.46 treats generally with the processing of unfair labor practice charges following issuance of a decision by an administrative law judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has decided to treat Respondent's letter as a motion for reconsideration of the Board's Order Remanding Proceeding to Regional Director for Hearing. Having duly considered the matter, Respondent's motion for reconsideration, for the reasons detailed below, is denied.

In its letter, Respondent contends, *inter alia*, that the circuit court of appeals' denial of enforcement of the Board's Order in Case 13-CA-20575 terminated the unfair labor practice case, that the hearing ordered by the circuit court of appeals is a hearing on objections, and thus a part of the proceedings in the underlying representation case (Case 13-RC-15219), and that, as such, "the hearing may not be conducted as an unfair labor practice hearing or some heretofore unheard-of amalgam of Objections hearing and unfair labor practice hearing." Respondent also contends that the Board's Order of July 19, 1982, cannot be limited to the issues specified by the Board because the circuit court of appeals held that the Employer was entitled to a "full hearing," so that "the Employer has the right to a hearing, without limitation, with respect to any conduct, whatsoever, which the Employer contends is objectionable."

With respect to remanding for a hearing in the unfair labor practice case, the Board's Order is in accord with longstanding Board policy. The underlying rationale of this policy is to preclude the inevitable delay which would result if the Board, as Respondent contends it must, were to reinstate the representation petition and, depending on the disposition of the election objections, require counsel for the General Counsel to renew its Motion for Summary Judgment. Under the present procedure, if the administrative law judge finds that an employer's election objections are meritorious, the administrative law judge may recommend that the underlying certification be revoked, and the refusal to bargain allegation be dismissed. Conversely, if the administrative law judge concludes that the objections are lacking in merit, the Order requiring Respondent to bargain with the certified Union may be reaffirmed.

Respondent suggests that it will somehow be prejudiced by the holding of a hearing in the unfair labor practice proceeding. However, we note that counsel for the General Counsel takes a nonadversarial role at the hearing as would be the case if the proceedings had not proceeded beyond the representation stage, and that Respondent was specifically advised that such procedure would be followed

here. Since, in the circumstances present here, the representation case and the unfair labor practice proceeding "are really one" (*Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 158 (1941)), neither logic nor timely and efficient administration of the Act requires that these matters be arbitrarily divided, thereby requiring a second unfair labor practice proceeding if the Board's decision is adverse to Respondent and Respondent then continues to refuse to bargain.

As noted above, remand for a hearing in the context of an unfair labor practice case is a practice of long standing. See *Graphic Arts Finishing Co., Inc.*, 182 NLRB 318 (1970); *Robert's Tours, Inc.*, 244 NLRB 818 (1979); *Polyflex M Company*, 258 NLRB 806 (1981). The contention that the Board's practice violates due process has been uniformly rejected by reviewing courts. See, for example, *N.L.R.B. v. The Western and Southern Life Insurance Company*, 391 F.2d 119, 121 (3d Cir. 1968); *N.L.R.B. v. Bancroft Manufacturing Company*, 516 F.2d 436 (5th Cir. 1975); *Beird-Poulan Division, Emerson Electric Company v. N.L.R.B.*, 649 F.2d 589 (8th Cir. 1981); *N.L.R.B. v. Bata Shoe Company, Inc.* (enforcement denied on other grounds), 377 F.2d 821, 825, 826 (4th Cir. 1967). As the court observed in *Bata Shoe, supra*, due process requires only that "a hearing be conducted at some stage of the administrative proceeding before the objecting party's rights can be affected by an enforcement order." Further, Board orders requiring an employer to bargain have been enforced where, following a remand from the court, a hearing on objections

was conducted in the unfair labor practice hearing. See, for example, *Regency Electronics, Inc.*, 523 F.2d 322 (7th Cir. 1975); *Newport News Shipbuilding and Dry Dock Company v. N.L.R.B.*, 608 F.2d 108, 113-114 (4th Cir. 1979).

Respondent also argues that it is entitled to "a hearing on objections without limitation, with respect to any conduct whatsoever." If Respondent is suggesting that it may raise issues beyond its original objections, or other issues not previously raised before the Board and the court, such argument borders on the frivolous. Section 10(e) of the Act expressly provides that only issues raised before the Board may be considered before the court on review. Further, the court's opinion contains nothing which indicates the court intended to ignore this limitation or pass on matters not raised before the court. In denying enforcement the court's opinion specifically stated that "a hearing is necessary under the circumstances of this case." The court's opinion contains no reference to objections other than those discussed. The Board's July 19, 1982, Order Remanding Proceeding to Regional Director for Hearing accurately delineated the issues which the court believed to require an evidentiary hearing. Accordingly, for the reasons detailed above,

IT IS HEREBY ORDERED that Respondent's letter of October 4, 1982, which the Board has treated as a motion for reconsideration of its Order Remanding Proceeding to Regional Director for Hearing, is hereby denied.